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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TIM A. PORI, Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	A135181 (Alameda County Super. Ct. No. 163657)

By the Court:[1]

Tim A. Pori (Pori) is a criminal defense attorney representing Andrew Wong in *People v. Wong* (Super. Ct. Alameda County, 2009, No. 163657) (*People v. Wong*), presently pending retrial in respondent, the Superior Court of Alameda County.[2] By Order and Judgment of Contempt filed April 16, 2012, Pori was found in contempt of court (Code Civ. Proc., §§ 1211, 1218),[3] and sentenced to spend five days in the county

[1] Before Marchiano, P.J., Margulies, J., and Dondero, J.

[2] A mistrial was declared in the case in September 2011. Pori represented Wong during the first trial.

[3] Further statutory references not otherwise noted are to the Code of Civil Procedure.

jail and to pay a fine of $1,000. In addition, sanctions in the amount of $1,500 were imposed. (§ 177.5.)

Pori sought immediate relief from this court.[4] We stayed the Order and Judgment of Contempt. As will be seen, although we do not condone Pori's conduct where he improvidently overscheduled himself and then tried to pick and choose which cases he would try, the contempt judgment is void due to technical procedural noncompliance, and the imposition of sanctions pursuant to section 177.5 is not supported by the record. Accordingly, we will direct issuance of a peremptory writ in the first instance.

BACKGROUND

The parties are familiar with the history of this case, so we do not recite it in depth. Following the September 2011 mistrial of *People v. Wong*, a new trial date of April 16, 2012 was set. Pori believed a continuance would be granted in the Wong case if Pori was otherwise in trial.[5] On March 27, 2012, Pori received a telephone call from Judge Goodman (who had presided over the first Wong trial) inquiring whether Pori would be prepared to proceed with retrial on April 16, 2012. Pori explained he would not because of another multi-defendant homicide trial in Solano County set to commence on April 30, 2012. Judge Goodman directed him to contact Judge Panetta and the district attorney to inform them he would be filing a motion to continue. After Pori left a message with Judge Panetta's chambers, he received a call from her clerk to inform him Judge Panetta would deny any motion to continue.

Nonetheless, on March 29, 2012, Pori filed a motion to continue *People v. Wong*, and alternatively, a motion to withdraw as counsel. Both motions were heard and denied

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[4] Pori filed a petition for writ of habeas corpus, a traditional challenge to a contempt judgment. In the interest of judicial economy, we have deemed the petition to be one for a writ of prohibition. (See, e.g., *Evans v. Superior Court* (1939) 14 Cal.2d 563, 580; *Lister v. Superior Court* (1979) 98 Cal.App.3d 64, 69.)

[5] In his filings in this court, petitioner argues his understanding of "in trial" encompassed his busy trial schedule as described to the court below, even if he was not in fact literally in trial on April 16, 2012.

on April 5, 2012.[6] On that day, however, Pori was not present, but was in trial on another case. Attorney John Baumgardner appeared instead. Pori's written motions were supported by his declaration explaining the details of his trial schedule in several counties, his efforts to manage his caseload, and a description of his decision to prepare for the Solano County murder trial set for April 30, rather than to prepare for *People v. Wong*, even though the latter was set to commence first.

In denying the motion to continue, and distinguishing cases cited in Pori's motion, Judge Panetta concluded, "I agree, this court agrees, that counsel for defendant has a right to a reasonable opportunity to prepare for trial. But this Court believes Mr. Pori has had a reasonable opportunity to prepare for trial." The court also noted Pori had 11 more days until the trial date of April 16, and that "[i]f Mr. Pori is not in trial on April 16 . . . he's going out on this case."

On April 16, 2012, the day set for trial, Pori appeared with attorney Daniel Russo (Russo), "anticipating a contempt proceeding." Judge Panetta asked Pori if he was "ready to go to trial today," and Pori answered, "No . . . [f]or the reasons stated in my declaration [referring to his motion to continue, denied April 5, 2012]." In addition, Russo offered a new declaration from the case investigator, and an e-mail from the expert witness concerning recently received discovery in the case.

Judge Panetta found nothing in the declarations to warrant reconsideration of the ruling on the motion to continue. She then inquired what effort Pori had made to prepare *People v. Wong* since March 12, 2012 (the date when the Solano County case was continued to April 30, 2012). After some explanation from Russo about Pori's schedule and why Pori had been preparing the Solano County case, Judge Panetta stated, "I know what's going on here. He picked which cases he thought should go out when. . . . It's

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[6] Wong filed a petition for writ of mandate in this court challenging those orders (*Wong v. Superior Court,* A135091, filed April 11, 2012). We summarily denied it April 12, 2012. By separate order, we have taken judicial notice (Evid. Code §§ 452, subd. (d) & 459, subd. (b)) of the exhibits filed in that case, all of which were before the superior court when it issued the rulings challenged here.

clear from what I read in these transcripts that he submitted himself that this case was last priority. . . . [¶] What's clear . . . is Mr. Pori took it upon himself to decide which cases are going to go out when . . . that's this Court's job, not Mr. Pori's."

Next, Judge Panetta asked, "What if the Court were to send Mr. Pori to report to a trial department today with the understanding that nothing would happen for three weeks so he would have his three weeks?" Russo stated, "He is refusing," explaining "he has the other trial that he has to prepare for too."

After further discussion, Judge Panetta stated, "He's clearly refusing the Court's reasonable accommodation to go out with a three week cushion. Is that correct . . . ?" Attorney Russo responded, "Yes, Your Honor."

Judge Panetta then announced that she was "considering now a finding of contempt" and she "will allow Mr. Pori additional time to be heard on that . . . since this is sort of a hybrid—although it's really a direct contempt since he's refusing to be sent to trial here in the direct and immediate presence of the Court." She apprised Pori of the contempt penalties and noted, "in addition the Court may sanction Mr. Pori . . . per Code of Civil Procedure section 177.5 . . . ."

Yet, after summarizing her findings and conclusions regarding the procedural background of the case, Judge Panetta declined to order him immediately to trial, stating: "I'd like to say, Mr. Pori, you're going to Department 10 right now, they're available, Judge Rolefson is waiting for the case for trial and we will build in that three weeks you need, I'm not going to do that."

She explained, "I did previously give notice at the end of [the] April 5th hearing that . . . counsel would be subject to contempt proceedings if he failed to comply with the Court's order to go to trial." And, "because Mr. Pori is refusing to go to trial and is unprepared today and because this is occurring in the court's immediate view and presence, this is a direct contempt of court. Again, on the chance it's considered a hybrid contempt, I want to make sure Mr. Pori has fully been heard about mitigating circumstances other than what's been put in his papers and already presented to the Court."

Pori asked for no additional time to present witnesses. After he offered an apology, Judge Panetta ruled, "I do find by proof beyond a reasonable doubt . . . that Mr. Pori has refused without good cause or substantial justification to comply with a lawful court order to be adequately prepared for trial on today's date." In addition, Judge Panetta ruled, "the Court is imposing sanctions pursuant to Code of Civil Procedure section 177.5. That is in the amount of $1,500, and that is imposed for Mr. Pori failing to be ready and prepared to go to trial on today's date as he has had more than a reasonable amount of time to prepare for trial and he's not exercised sufficient diligence in preparing for this trial."

THE JUDGMENT OF CONTEMPT

Section 1209 prescribes the acts or omission which may constitute contempt. As potentially relevant here, subdivision (a) provides:

> "(1) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.
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> "[¶] . . . [¶
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> "(5) Disobedience of any lawful judgment, order, or process of the court.
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> "[¶] . . . [¶]
>
> "(9) Any other unlawful interference with the process or proceedings of a court.
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> "[¶] . . . [¶]"

Section 1211, subdivision (a) provides: "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he or she be punished as therein prescribed.

"When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers."

A contempt committed in the immediate view and presence of the court is a direct contempt. Others (requiring an order to show cause supported by affidavit) are indirect contempts. Not infrequently, however, a direct contempt may be committed in the court's presence, but explained by matters occurring outside the immediate view and presence of the Court. These contempts have traditionally been described as hybrid contempts, still within the category of direct contempt. (*Chula v. Superior Court* (1962) 57 Cal.2d 199, 203, 206–207 (*Chula*).) The classic example of a hybrid contempt is that of the attorney ordered previously to appear on a certain date and time who fails to appear, but offers an explanation based on events occurring outside the immediate view and presence of the court.

" 'The requirements of the order adjudicating contempt have been given expression in numerous opinions. In *Arthur* v. *Superior Court* [(1965)] 62 Cal.2d [404,] 407, we observed: "Section 1211 of the Code of Civil Procedure establishes the procedure that is to be followed in adjudging persons in contempt of court. Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be made reciting the facts, adjudging the person guilty and prescribing the punishment." *We have emphasized, however, that such an order is valid only if it recites facts with sufficient particularity to demonstrate on its face that petitioner's conduct constituted a legal contempt.* [Citations.]' (*In re Buckley* (1973) 10 Cal.3d 237, 247 [*Buckley*].)" *(In re Littlefield* (1993) 5 Cal.4th 122, 138 (*Littlefield*), original italics.) These requirements are jurisdictional. (*Littlefield*, *supra,* 5 Cal.4th 139; *Chula, supra,* 57 Cal.2d at p. 203; *In re Wells* (1946) 29 Cal.2d 200, 201 (*Wells*); In *re Ringgold* (2006) 142 Cal.App.4th 1001, 1011 (*Ringgold*).)

" ' "[T]he order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt and such facts must prove the contempt. Mere conclusions are not sufficient." ' " (*Wells, supra*, 29 Cal.2d at pp. 201–202, quoting *In re Battelle* (1929) 207 Cal. 227, 256 [direct contempt finding against witness for refusing to answer questions is invalid unless it contains

" ' "an express recital of facts affirmatively showing not only the precise questions which he has declined to answer[,] . . . but also affirmatively setting forth the facts which show the materiality and pertinency of . . . [the] evidence to the issue before the court . . ." ' "].) The Supreme Court has noted: " ' "[*A*]*n order which assumes to punish summarily a direct contempt of court is void unless it shows on its face facts sufficient to constitute a legal contempt.* [Citations.] Such facts must be stated with sufficient particularity to show, without aid of speculation, that contempt actually occurred. [Citation.]" ([*Chula, supra,* 57 Cal.2d at p. 203], italics added.)' (*Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 222 (*Boysaw*).) In a similar vein, the Supreme Court has emphasized that the recitation of facts constituting the contempt must be done with 'specificity' in the written order. (*Ibid*.; see *Littlefield*, *supra*, 5 Cal.4th at p. 129, fn. 6 . . . .) Further, the recital of facts requirement is not satisfied by a judge's conclusions as to the acts constituting the contempt nor may the order be sustained by reference to extrinsic documents; albeit, a transcript which places the conduct in context may be attached to the order. (*Littlefield*, *supra*, at pp. 138–139 & fn. 10; *Fine v. Superior Court* (2002) 97 Cal.App.4th 651, 666.) The order need not contain empty formalisms such as the misconduct occurred in the presence of the court when the recitation of facts in the order shows that is exactly what happened. ([*Boysaw*, *supra*, 23 Cal.4th at pp. 220–221].)" (*Ringgold, supra,* 142 Cal.App.4th at pp. 1012–1013.)

When the contemptuous conduct arises from a prior court order, the contempt order must precisely describe the prior order, both its terms and its date. (*Littlefield*, *supra,* 5 Cal.4th at pp. 138–139; see *Boysaw, supra,* 23 Cal.4th at p. 222 [no warning to attorney that particular tone of voice objectionable].)

"Both *Littlefield* and *Boysaw* establish a practical and relatively bright line rule for written contempt orders premised on a violation in the presence of the judge of a previous order: a written direct contempt order which is based on the violation of a prior order must describe the prior order. The reference to the prior order must not be an 'empty formalism' nor must the description of the prior order 'exalt form over substance.' (*Boysaw*, *supra*, 23 Cal.4th at p. 220.) As with other aspects of a written contempt order,

the reference to the prior order must: recite the facts (what the prior order directed be done); be stated with sufficient particularity that there is no need to refer to any extrinsic document in order to determine what was required by the prior order (with the caveat that a transcript may be attached to the order so as to put the contemptuous conduct in context); be described with sufficient particularity to demonstrate on its face the ensuing contemptuous conduct violated the prior order; and not consist of the judge's conclusions regarding the prior order. (See [*Boysaw*,] *supra*, 23 Cal.4th at p. 220; [*Littlefield*,] *supra*, 5 Cal.4th at p. 138.)" (*Ringgold, supra,* 142 Cal.App.4th at p. 1014.)

The April 16, 2012 Order and Judgment of Contempt fails to meet these jurisdictional requirements. Initially, it states Pori "refused to be sent out to trial on the previously set trial date of April 16, 2012, because he was not prepared for trial." Later, it recites, "Contemner willfully failed to comply with the court's order to be prepared to go to trial on April 16, 2012," and that he "disobeyed a lawful order of the court to be prepared to be sent out to trial on April 16, 2012." Nowhere does the contempt judgment state the date when the order was made or express the terms of any such "order to be prepared for trial," or to "be sent out to trial."

The judgment does state Pori was "notified" on March 27, 2012 the trial date would not be continued, but such a notification is not an order to be prepared to go to trial on that specific date. The contempt judgment also recites "[o]n April 5, 2012, the court denied the defendant's motion to continue the trial date and maintained the trial date of April 16, 2012." An order denying a motion to continue and maintaining a trial date is not an order to be prepared to go to trial on a specific date.

The transcripts of the April 5 and April 16 hearings, attached to the Order and Judgment of Contempt, do not save it. Pori was not present in court on April 5, 2012. Contrary to the April 16, 2012 statement by Judge Panetta—"I did previously give notice at the end of the April 5th hearing that . . . counsel would be subject contempt proceedings if he failed to comply with the Court's order to go to trial"—no such warning appears in the April 5th transcript. In any case, as we have explained, a contempt judgment which fails to recite on its face the precise jurisdictional facts is void,

regardless of the transcript record. (*Littlefield, supra,* 5 Cal.4th at p. 138; *Buckley, supra,* 10 Cal.3d at pp. 246–247.)

The contempt judgment also states: "Contemner refused the court's reasonable accommodation to be sent out to trial with a three week 'cushion' to allow Contemner additional time to prepare for trial." But nowhere does the order recite that Pori was ordered to go to trial with that accommodation and he refused the order. Moreover, as we have described above, at the hearing on April 16, 2012, the court expressly declined to make such an order.

A valid, written judgment of contempt is jurisdictional. A defective judgment of contempt is void. We, therefore, reluctantly annul the finding of contempt.

SECTION 177.5 SANCTIONS

Similarly, we must set aside the section 177.5 sanctions order. Section 177.5 provides: "A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term 'person' includes a witness, a party, a party's attorney, or both.

"Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order."

As with the judgment of contempt, sanctions were imposed "for [Pori's] failure to comply with a lawful court order to be prepared to be sent out to trial on April 16, 2012." As we have explained, no such order was made.

CONCLUSION AND DISPOSITION

The judgment of contempt is void, and the imposition of sanctions pursuant to section 177.5 is not supported by the record. Pori may not be subjected to further proceedings for the same conduct. (*In re Baroldi* (1987) 189 Cal.App.3d 101, 111,

overruled in part *Boysaw, supra,* 23 Cal.4th at p. 221..) We, therefore, need not and do not consider Pori's other challenges to the Order and Judgment of Contempt.[7]

We gave the parties notice that we might choose to act by issuing a peremptory writ in the first instance. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177–180.) No useful purpose would be served by issuance of an alternative writ and oral argument.

Therefore, let a peremptory writ of prohibition issue restraining respondent, the Superior Court of Alameda County, from enforcing the April 16, 2012 Order and Judgment of Contempt against Tim A. Pori. The stay previously imposed shall remain in effect until the remittitur issues.

[7] Nothing in this opinion prevents the superior court from the use of its contempt power should Pori engage in any future conduct violative of express orders of the court.